IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 202 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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COMMISSIONER OF INCOME-TAX

Versus

SARASPUR MILLS LTD.

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Appearance:

MR MANISH R BHATT for Petitioner

MR JP SHAH FOR MANISH J SHAH for Respondent

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CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.S.SHAH

Date of decision: 15/02/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this Reference, at the instance of the Revenue, the following questions have been referred to us for our opinion in respect of A.Y. 1980-81 :

"1. Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal has been right in holding that the assessee was entitled to deduction of the claim of Rs.3,59,755/(Rs.2,31,360 + 1,28,395) being excise duty on the ground that liability thereof had accrued but quantification was required to be done ?

2. Whether, the finding of the Appellate Tribunal that the liability to pay excise duty of Rs. 3,59,755/- of which a deduction was claimed in the assessment of the relevant assessment year in question, had accrued but quantification was required to be done, despite the fact that the provision was made only on the basis of show cause notice, is correct in law ?"

2. The respondent-assessee, following the mercantile system of accounting, provided for and claimed deduction of sum of Rs. 3,59,755/- as excise duty liability in the accounting year 1979 relevant to A.Y. 1980-81. The said disputed amount consisted of two parts: Rs.2,31,360/ being deduction for the accounting year 1979 was made on the basis of show-cause notice issued by the Excise Department in December, 1979. The other claim for an amount of Rs. 1,28,359/- was made on the basis of letter dated 21.8.1980 addressed by the assessee to the Excise Authorities furnishing the details in respect of yarn sized during the period from November, 1979 to January, 1980. In respect of both the claims, the I.T.O. held that liabilities claimed were on the basis of a mere show-cause notice and the same were not finally ascertained. In fact, the assessee had challenged the show-cause notice and the liability in the court of law and hence there was no legally enfoceable liability for the disputed amount of central excise. The I.T.O. disallowed the total claim of Rs. 3,59,755/- as per the assessment order dated 17.11.1981. In appeal, the Commissioner of Income-tax (Appeals) upheld the contention of the assessee that liability to pay excise duty had already accrued upon manufacture of the concerned goods, but only quntification was not done and,

therefore, the decision of the Supreme Court in KEDARNATH JUTE MFG. CO.LTD. v. COMMISSIONER OF INCOME-TAX (CENTRAL), CALCUTTA, (1971) 82 ITR 363 was followed. The C.I.T. accordingly deleted addition of Rs. 3,59,755/- as per his order dated 4.2.1982. The Tribunal confirmed the order of CIT (appeals). Hence, this Reference at the instance of the Revenue.

3. We have heard Mr. B.B.Naik, learned counsel for the Revenue and Mr. J.P.Shah, learned counsel for the assessee.

4. Mr. Naik, learned counsel for the Revenue has submitted that in view of the decisions of the Bombay High Court in STANDARD MILLS CO. LTD. v. COMMISSIONER OF INCOME-TAX, (1998) 229 ITR 366 and COMMISSIONER OF INCOME-TAX v. INDIAN SMELTING AND REFINING CO.LTD. (1998) 230 ITR 194, the deduction of excise duty liability can be claimed only in the year in which the adjudication order is passed and mere issuance of a show-cause notice by the Excise Department does not entitle the assessee to claim any such deduction of excise duty liability on the ground that the liability had accrued when the goods were manufactured.

5. On the other hand, Mr. J.P.Shah, learned counsel for the assessee has heavily relied on the decision of the Calcutta High Court in COMMISSIONER OF INCOME-TAX, CENTRAL, CIRCLE I, CALCUTTA v. CENTURY ENKA LTD. (1981) 130 ITR 267 and the decision of Kerala High Court in EDDY CURRENT CONTROLS (INDIA) LTD. v. COMMISSIONER OF INCOME-TAX, (1992) 198 ITR 491.

6. In the alternative, Mr. Shah has submitted that in any view of the matter, in the peculiar facts of the case, the question has become academic because after claiming deduction on the aforesaid amounts of Rs. 2,31,360/- and Rs. 1,28,359/- for A.Y. 1980-81 (relevant accounting year being calendar year 1979), ultimately when the Assistant Collector of Central Excise passed order dated 30.3.1993 in favour of the assessee discharging the show-cause notices, the assessee had included the aforesaid amounts along with other amounts as income under section 41(1) of the Income Tax Act (hereinafter to be referred to as the "Act"). Mr. Shah has produced on record detailed working of the amounts involved in this controversy specifically pointing out that in the return of income for A.Y. 1980-81, relevant to the accounting year ended on 31.3.1990, a sum of Rs. 7,68,080/-(Year 1979) was included as income under section 41(1) in view of the order of Assistant Collector

of Central Excise. The said figure comprises of following amounts:

(a) 1,28,175
30,160
1,77,302
72,788
4,08,625 For which Demand Notices have been received and allowed by I.T.O.

(b) 1,42,361
88,699
2,31,060 For which show cause notices have been received, hence disallowed by the I.T.O.

(c) 53,240
34,962
21,252
18,741
1,28,395 For which no notice has been received from the Excise Department, but as duty pertaining to the production made in A.Y. 1979, we have provided for the same in the books which is not allowed by the I.T.O.

Points No. (b) & (c) are in the present appeal.

It is, therefore, submitted by Mr.Shah, learned counsel for the assessee, that since the aforesaid amounts of Rs. 2,31,060/- and Rs. 1,28,359/- for which the assessee had claimed deduction for A.Y. 1980-81 were already included as 'income' under section 41(1) of the Act for A.Y. 1990-91, if the present Reference is answered against the assessee, the result would be that the assessee would get worst of both the worlds, inasmuch as the assessee had already included the aforesaid disputed amounts as income under section 41(1) for A.Y. 1990-91 on the basis that deduction claimed for A.Y. 1980-81 was not required to be allowed and if the claim for deduction for the aforesaid amonts for A.Y. 1980-81 itself is disallowed, the assessee would be paying tax twice over.

7. It is pertinent to note that after the assessee added the aforesaid disputed amounts as his income under section 41(1) for A.Y. 1980-81, at the hearing before the Assessing Officer, the assessee contended that since the dispute regarding liability of the assessee to pay

excise duty was pending before the Supreme Court, the disputed amount along with other amounts shown as income under section 41(1) of the Act should not be treated as income. The Assessing Officer, however, rejected the said claim and held that once there was withdrawal of show-cause notice by the Excise Department, there was no need to wait till the decision of the Supreme Court and that if the Supreme Court takes a different view, the liability would once again arise in the year in which the Supreme Court decides the matter. As far as this finding of the Assessing Officer is concerned, the same was allowed to become final because the assessee did not press the challenge to the said finding before the CIT (appeals).

8. In rejoinder Mr. Naik, learned counsel for the Revenue has submitted that the subsequent development sought to be relied on by the assessee cannot be considered and the Reference should be decided on the basis of the facts which are recorded in the statement of case required by the Tribunal. It is also submitted in the alternative that the assessee had tried to take advantage of getting income-tax liability postponed from A.Y. 1980-81 to A.Y. 1990-91 and that if the assessee's argument is accepted apart from the loss in taxes on account of lower tax rates for A.Y. 1990-91, the Department would also lose substantial amount by way of interest for those ten years.

9. In response to a query from the Court put to him as to how the assessee could be subjected to taxation twice over as per the apprehension expressed on behalf of the assessee (once by disallowance assessment for A.Y. 1980-81 and thereafter charging the disallowed deduction as income for A.Y. 1980-81), Mr. Naik has submitted that once the question referred to this Court for A.Y. 1980-81 is answered in favour of the Revenue and the deduction is to be disallowed on the ground that the excise duty liability did not accrue in the year in which the show-cause notice was issued and that such liability can accrue only in the year in which adjudication order is passed or the demand notice is issued under sub-rule (2) of Rule 10 of the Central Excise Rules,1944 ("Rules" for short) the Tribunal shall have to give effect to the said opinion by directing the I.T.O. to reopen the assessments for A.Y. 1990-91 onwards in accordance with the provisions of sections 260(1) read with section 153(3) of the Act, which read as under :-

"Decision of High Court or Supreme Court on the case stated.

260(1) : The High Court or the Supreme Court upon hearing any such case, shall decide the questions of law arose therein and shall deliver its judgment thereon containing the grounds on which such decision is founded, and a copy of the judgment shall be sent under seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment."

"Time limit for completion of assessment and reassessments.

153 (3) : The provisions of sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may subject to the provisions of sub-section (2A) be completed at any time -

(i) Where a fresh assessment is made under section 146;

(ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under sections 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act;

(iii) where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147.

10. In view of our decision rendered today in I.T.R.No. 121/89 taking the view that the excise duty liability does not accrue upon issuance of a show-cause notice by the Excise Department, but upon passing of the adjudication order (under sub-rule (2) of Rule 10 as it stood at the relevant time) which is referred to as a demand notice, Mr. Shah, learned counsel for the assessee has no objection to the course, which is suggested on behalf of the Revenue, being adopted for A.Y. 1990-91 and subsequent relevant assessment years.

11. Having heard the learned counsel for the parties it appears to us that even while holding that the assessee was not entitled to deduction of claim of Rs. 3,56,755/- for A.Y. 1980-81, as no excise duty liability had accrued on issuance of mere a show-cause notice, we

record the statement made by Mr. Naik on behalf of the Revenue that while giving effect to this opinion in respect of A.Y. 1980-81, the Tribunal as well as Income-tax authorities shall reopen the assessments for A.Y. 1990-91 and subsequent assessment years for the purpose of ensuring that the amount of Rs. 3,59,755/(comprising of Rs. 2,31,360 and Rs.1,28,395) added as income under section 41(1) of the Act shall have to be excluded from income for A.Y. 1990-91, resulting into corresponding increase in the loss incurred by the Company and carried forward in the subsequent accounting year/s.

The Reference stands disposed of, with no order as to costs.

(J.M.Panchal,J.)

( M.S.Shah, J.)

(patel)